

SUN EXPLORATION AND PRODUCTION CO.

IBLA 85-257

Decided January 12, 1987

Appeal from a decision of the Eastern States Office, Bureau of Land Management, cancelling noncompetitive oil and gas lease of acquired lands. ES-25224.

Affirmed.

1. Oil and Gas Leases: Acquired Lands Leases -- Oil and Gas Leases: Cancellation -- Oil and Gas Leases: Noncompetitive Leases -- Oil and Gas Leases: Rentals

BLM must cancel a noncompetitive oil and gas lease of acquired lands where the lessee failed to fully pay the first year's advance rental at the time of submission of his lease offer, in accordance with 43 CFR 3103.3-1 (1979), the deficiency was more than 10 percent and a subsequent lease offer was filed by a qualified third party.

APPEARANCES: Theresa Fay, Esq., Dallas, Texas, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

The Sun Exploration and Production Company (formerly the Sun Oil Company (Delaware)) has appealed from a decision of the Eastern States Office, Bureau of Land Management (BLM), dated November 16, 1984, cancelling appellant's noncompetitive oil and gas lease of acquired lands, ES-25224.

Effective June 1, 1983, BLM issued a noncompetitive oil and gas lease to appellant for 80 acres of acquired land situated in the W 1/2 NE 1/4 sec. 17, T. 24 N., R. 1 E., Michigan Meridian, Ogemaw County, Michigan, pursuant to section 3 of the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 352 (1982). The lease was issued pursuant to a noncompetitive oil and gas lease offer which had been filed July 3, 1980. At that time appellant had paid a \$ 10 filing fee and \$ 40 as the first year's advance rental. In its November 1984 decision, BLM cancelled appellant's oil and gas lease because the lease offer had not been accompanied by "full payment" of

the first year's advance rental, i.e., \$ 80, as required by 43 CFR 3103.3-1 (1979), and the deficiency was more than 10 percent. ^{1/}

In its statement of reasons for appeal, appellant contends that its oil and gas lease should be reinstated because it paid the first year's advance rental in accordance with section 2(d)(1)(a) of the lease offer form (Form 3110-3 (September 1973)), which required payment of "50 cents per acre" for lands wholly outside the known geologic structure of a producing oil or gas field, and the rental rate was not increased "from 50 cents per acre to \$ 1.00 per acre" until final rulemaking which amended 43 CFR 3103.2-2 effective August 22, 1983. Appellant noted that the signing of its lease offer by BLM on May 12, 1983 had created a "binding contract," citing Guy W. Franson, 30 IBLA 123 (1977). On December 18, 1984, appellant submitted \$40 in payment of the deficiency in the first year's advance rental.

[1] At the time appellant submitted its lease offer, first year's advance rentals for noncompetitive oil and gas leases for either public domain or acquired lands were payable at the rate of \$ 1 per acre or fraction thereof, as required by 43 CFR 3103.3-2(a) and (c) (1979). In fact, the rental per acre had been increased from 50 cents to \$ 1, effective February 1, 1977. See 42 FR 1032-1033 (Jan. 5, 1977). The final rulemaking to which appellant refers recodified the rate at which first year's advance rentals were to be paid with respect to noncompetitive oil and gas lease offers, but did not change that rate. See 43 CFR 3103.2-2(b) (48 FR 33667 (July 22, 1983)). While the lease offer form used by appellant erroneously stated that the applicable rental rate was 50 cents per acre or fraction thereof, appellant is presumed to have known that the actual rate was \$ 1 per acre or fraction thereof at the time appellant filed its lease offer, as set forth in duly promulgated regulations. 44 U.S.C. §§ 1507, 1510 (1982); Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947).

Accordingly, we conclude that appellant failed to comply with 43 CFR 3103.3-1 (1979) where its lease offer was not "accompanied by full payment of the first year's rental" and the deficiency was more than 10 percent. BLM should have rejected appellant's lease offer. Dorothy L. Davis, 88 IBLA 282 (1985).

We turn, therefore, to the question of whether BLM properly cancelled appellant's oil and gas lease where appellant had failed to comply with 43 CFR 3103.3-1 (1979).

^{1/} Departmental regulation 43 CFR 3103.3-1 (1979) provided that:

"Each offer, when first filed, shall be accompanied by full payment of the first year's rental based on the total acreage if known, and if not known, on the basis of 40 acres for each smallest legal subdivision. An offer deficient in the first year's rental by not more than 10 percent will be approved by the signing officer provided all other requirements are met. The additional rental must be paid within 30 days from notice under penalty of cancellation of the lease."

The regulation is currently codified at 43 CFR 3103.2-1 and appears without relevant substantive change.

An oil and gas lease signed by both the Department and a private lessee has long been regarded as a "binding instrument [which] cannot be vitiated by unilateral action, all else being regular." Barbara C. Lisco, 26 IBLA 340, 344 (1976), and cases cited therein. However, notwithstanding this principle, it is also well established that the Secretary generally has the authority to cancel any oil and gas lease for violations of applicable Departmental regulations occurring prior to issuance of the lease. Boesche v. Udall, 373 U.S. 472 (1963); Bernard Kosik, 70 IBLA 373 (1983). Indeed, 43 CFR 3108.3(b) provides that: "Leases shall be subject to cancellation if improperly issued." However, the language of the regulation makes cancellation of an improperly issued lease a discretionary matter. ^{2/} Cf. Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969). Moreover, the Department has long held that an "oil and gas lease, although improvidently issued in violation of regulatory requirements but for land available for leasing, ^{3/} ordinarily will be permitted to stand in the absence of intervening rights or some overriding policy consideration." Merle C. Chambers, 40 IBLA 144, 145 (1979); see also Claude C. Kennedy, 12 IBLA 183 (1973), and cases cited therein.

However, where a lessee or the Department violated a Departmental regulation in the course of issuance of a lease, cancellation of the lease is mandated where failure to cancel the lease will "prejudice" the rights of others. McKay v. Wahlenmaier, 226 F.2d 35, 42 n.11 (D.C. Cir. 1955); Bernard Kosik, *supra*; see also Boesche v. Udall, *supra*. This is consistent with the Secretary's obligation under 30 U.S.C. § 226(c) (1982) to see that land is leased to the first qualified applicant. To preserve an oil and gas lease issued in contravention of a Departmental regulation such that the offeror was not qualified to receive a lease, where another qualified lease offer has subsequently been filed, would violate that statutory obligation. Thus, in Kosik, we affirmed a BLM decision cancelling an oil and gas lease which was issued to the second priority applicant under a simultaneous oil and gas lease drawing, rather than the first priority applicant, who was the first qualified applicant, in violation of 30 U.S.C. § 226(c) (1982) and applicable Departmental regulations. In McKay, the court concluded that the Secretary should have cancelled a lease issued to the first priority applicant in a simultaneous oil and gas lease drawing in contravention of the rights of the second priority applicant, where the first priority applicant had failed to

^{2/} In contrast, in the case of failure to pay any deficiency in the first year's advance rental within 30 days of notice of the deficiency, where the deficiency is less than 10 percent, 43 CFR 3103.3-1 (1979) provided that the penalty is "cancellation of the lease." See also 43 CFR 3103.2-1(a). Thus, cancellation of a lease in such circumstances has been treated as mandated by regulation. Warren L. Jacobs, 71 IBLA 385 (1983), and cases cited therein; see also, 43 CFR 3112.5-3; Mark A. Emmons, 76 IBLA 262 (1983); D. R. Weedon, 51 IBLA 378, 384-5 (1980), appeal dismissed, Weedon v. Watt, Civ. No. 81-0749 (D.D.C. Oct. 9, 1981), rev'd, 684 F.2d 957 (D.C. Cir. 1982).

^{3/} In the case of a lease improperly issued because the land was not actually available for leasing, the Board has concluded that cancellation of the lease is required. L & B Land Lease Group 82-3, 88 IBLA 221 (1985); Paul N. Temple, 33 IBLA 98 (1977).

abide by Departmental policy and regulations regarding disclosure of interests in other leases and multiple filings. 4/ See also Lynn Nelson, 66 I.D. 14 (1959).

In the present case, appellant clearly failed to comply with 43 CFR 3103.3-1 (1979), which would have justified rejection of its lease offer, and failure to cancel the oil and gas lease erroneously issued to appellant would clearly operate to the prejudice of a competing applicant. The record indicates that Leon F. Scully, Jr., filed noncompetitive oil and gas lease offer ES-27132, in part with respect to the land sought by appellant, on March 2, 1981, and the offer is still outstanding. Moreover, there is no evidence that Scully is not a qualified applicant and the offer appears regular on its face. In such circumstances, Scully, rather than appellant, should be treated as the "person first making application for the lease who is qualified to hold a lease" and, therefore, entitled to a lease under 30 U.S.C. § 226(c) (1982), all else being regular. Accordingly, we conclude that BLM properly cancelled appellant's noncompetitive oil and gas lease for acquired lands, ES-25224. Charles B. Gonsales, 69 I.D. 236 (1962), aff'd sub nom., Pan American Petroleum Corp., v. Udall, Civ. No. 5246 (D.N.M. June 4, 1964), aff'd, 352 F.2d 32 (10th Cir. 1965).

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Gail M. Frazier
Administrative Judge

We concur:

James L. Burski
Administrative Judge

R. W. Mullen
Administrative Judge

4/ The court in McKay v. Wahlenmaier, supra at 42 n.11, also stated that the Secretary has the right to cancel a lease "improvidently issued to a disqualified applicant, to the prejudice of the rights of others, whether or not there is involved a violation of some provision of the statute or of a regulation." (Emphasis added.)

